

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

DOCKET FILE COPY ORIGINAL

97-82

Seven Percent Interest Rate Imposed)
on C Block Installment Payment Plan Notes)

Public Notice DA 97-1152

COMMENTS OF PINNACLE TELECOM, L.P. OF JACKSON, MISSISSIPPI

Pinnacle Telecom, L.P. of Jackson, Mississippi ("Pinnacle"), by its attorneys, hereby opposes Omnipoint Corporation's request for waiver, and the informal requests for waiver listed in the above-referenced Public Notice (collectively, the "Petitioners") of the Commission's rules imposing a seven percent interest rate on eligible broadband Personal Communications Services ("PCS") C block licensees whose licenses the Commission conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment plan. For the reasons set forth herein, Pinnacle respectfully submits that Commission denial of the waiver requests would serve the public interest.

Pinnacle qualified under the Commission's Rules as a very small business owned by a woman and participated in both the C and F block auctions. As such, it was subject to an installment interest rate equal to ten-year U.S. Treasury obligations applicable on the date that the Commission grants a license.¹ Pinnacle relied on this rule in its decision to stop bidding on the 30 MHz C block licenses due to their high prices. Pinnacle ultimately

¹ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap. Report and Order, 11 FCC Rcd 7824, 7844 (1996).

was the highest bidder on one F block license, but this has given it access to only 10 MHz. The terms of the installment payment plan for F block licensees are not nearly as favorable as the C block installment plan, which features a longer period for interest-only payments.² Yet, Petitioners seek a waiver of the Commission rule that set the interest rate for installment payments for both F block and C block licenses without any acceleration of principal payments.

Petitioners' requests do not meet the standard for rule waivers set forth in WAIT Radio v. F.C.C.³ "Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver of a rule faces a high hurdle even at the starting gate."⁴

In this instance, Petitioners challenge "an established and tested agency rule," a rule that the Commission has applied regularly to all PCS licensees that pay for their licenses in installments. The Commission has consistently tied the installment payment interest rate to the rate for U.S. Treasury obligations at the time of licensing. Dating back to its Third Report and Order, the Commission decided to apply interest on installment payments equal to the rate for U.S. Treasury obligations of maturity equal to the license term for narrowband PCS licensees.⁵ The Commission extended this payment procedure,

² Id. at 7842, 7844.

³ WAIT Radio v. Federal Communications Commission, 418 F.2d 1153 (D.C. Cir. 1969).

⁴ Id. at 1157.

⁵ See Third Report and Order, 9 FCC Rcd 2941, 2979 (1994).

including the setting of interest rates tied to the rate for U.S. Treasury obligations at the time of licensing, to eligible Interactive Video and Data Service licensees.⁶

In its Fifth Report and Order, the Commission established the interest rate for small businesses that pay for their licenses in installments, “to ensure their opportunity to participate in broadband PCS.”⁷ Small businesses may pay their installments at a rate equal to that for ten-year U.S. Treasury obligations, plus 2.5 percent. Again, the Commission tied the interest rates for the installment plans to the U.S. Treasury rate “at the time of licensing.”⁸

Petitioners’ waiver requests do not meet the standards for rule waiver under 47 C.F.R. Section 24.819. Under that Commission rule section,

Waivers will not be granted except upon an affirmative showing: (i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.⁹

Petitioners do not demonstrate that the underlying purpose of the interest rate rule would be frustrated in their particular case, or that a grant of the waiver requests is in the public interest. The rule’s purpose was to “allow small businesses and companies owned by women and/or minorities to bid higher in auctions, thereby increasing their chances for obtaining

⁶ See Fourth Report and Order, 9 FCC Rcd 2330, 2340 (1994).

⁷ Fifth Report and Order, 9 FCC Rcd 5532, 5593 (1994).

⁸ Id.

⁹ 47 C.F.R. Section 24.819(a)(1).

licenses. In addition, it will allow them to concentrate their resources on infrastructure build-out and, therefore, it will increase the likelihood that they became viable PCS competitors.”¹⁰

The very fact that Petitioners outbid the competition, including Pinnacle, for their licenses demonstrates that the Commission’s interest rate rule worked to “increase their chances for obtaining licenses.” By paying for their licenses in installments, rather than submitting a lump sum, the Petitioners have been given the opportunity to concentrate on system build-out, which the Commission’s rule also contemplated. The Commission has repeatedly warned auction bidders not to bid on licenses if they lack the resources to pay for them. Pinnacle did as the Commission instructed and stopped bidding in the C block auction when it became clear that it would need a lower interest rate in order to make the installment payments on the C block licenses at the then current highest bids. The Commission designed its rule to “increase the likelihood” of viability, and did not guarantee success. The Commission’s rule clearly increased Petitioners’ likelihood of success, and there is no reason now to sandbag those that complied with the Commission’s rule by not overbidding.

Petitioners seem to want a flat interest rate for all PCS licensees, regardless of what the U.S. Treasury rate is. Thus, they attack the substance of the rule, and do not demonstrate that the rule does not meet its purpose. Their waiver requests must therefore fail under the Commission’s decision in Cincinnati Bell Telephone Company, in which the Commission held such attacks must demonstrate that the rule “fails to promote the purposes for which it is designed.”¹¹

¹⁰ Fifth Report and Order at 5593-94.

¹¹ Cincinnati Bell Telephone Company, 76 RR 2d 663, 665 (1994).

Petitioners also have not demonstrated that their circumstances are unique, that the Commission's interest rate rule is unduly burdensome, or that granting their waiver requests would serve the public interest. Petitioners do not face unique circumstances, but rather face the same market challenges, and the same Commission rules, as other installment-paying licensees that are meeting their payment obligations and building their systems.

Petitioners cannot successfully argue that the Commission's interest rate rule is unduly burdensome. They had substantial notice of the Commission's rule, which the Commission adopted before it conducted the C block auction,¹² and should have planned their payment schedule at the rate adopted by the Commission. Other entities that similarly ignored substantial notice provided by the Commission, and attempted to "correct" their inaction and lack of planning through rule waiver, have not been granted waiver requests.¹³

Granting Petitioners' waiver requests would not serve the public interest. Petitioners seek relief of a rule that the Commission adopted before the C block auction, and consistently applied, presumably only because they seek better financial terms for their licenses. That is not a valid reason for rule waiver, and granting these requests would allow companies to use rule waivers as a crutch for losing in the marketplace, even though the rule is valid and serves the purpose for which the Commission designed it. Changing the auction rules after the C block auction would also be both arbitrary and capricious and inequitable as C block auction participants, such as Pinnacle, that failed to make winning bids would be denied the opportunity

¹² See Fifth Report and Order at 5593.

¹³ See BDPCS, 3 CR 398 (Wireless Bur., 1996) (waiver denied in part because bidder had substantial notice that the C block was coming to a close and that the initial down payment obligation would soon become due).

to make the higher bids that they could have afforded if a more favorable installment payment interest rate had been made available prior to the C block auction. The Commission has not allowed rule waiver to cure business mistakes and other marketplace circumstances in the past¹⁴, and cannot do so now.

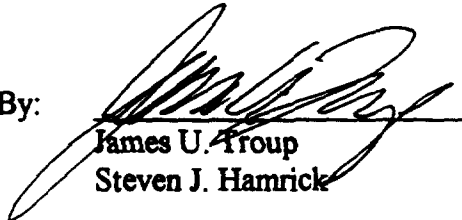
CONCLUSION

For all of the foregoing reasons, Pinnacle respectfully submits that the Commission should deny Petitioners' waiver requests because they do not satisfy the standard for a waiver of the Commission's auction rules.

Respectfully submitted,

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¹⁴ See National Telecom PCS, Inc., 3 CR 492 (Wireless Bur., 1996) (grant of waiver request would not be in the public interest because it would encourage future bidders to hide behind the alleged mistakes of their staff to avoid responsibility for their bids).

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 1997, a copy of the foregoing Comments was served by first-class mail, postage prepaid, upon the party(ies) on this service list.

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(By Hand-Delivery)

A handwritten signature in cursive script that reads "M. Dee English". The signature is written in black ink and is positioned above a horizontal line.

M. Dee English